United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

74-1404

ORIGINAL

In the

United States Court of Appeals

For The Second Circuit

FRANK BERNARDINI,

Plaintiff-Appellee,

vs.

REDERI A/B SATURNUS,

Defendant and Third Party Plaintiff-Appellant,

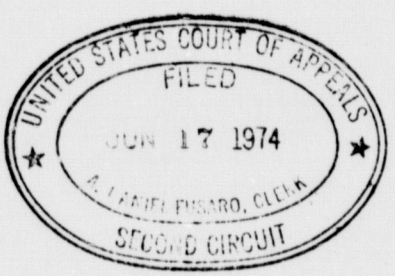
and

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Third Party Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

BRIEF FOR DEFENDANT AND THIRD PARTY PLAINTIFF-APPELLANT



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Defendant and Third Party
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- against -

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Third Party Defendant-
Appellee.

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BRIEF ON BEHALF OF DEFENDANT AND THIRD PARTY PLAINTIFF-APPELLANT, REDERI A/B SATURNUS

Preliminary Statement

This is an appeal by defendant and third party plaintiff-appellant, Rederi A/B Saturnus (hereinafter "shipowner"), from the judgment in all respects adverse to it dated October 25, 1973, after trial before the Honorable Robert J. Ward and a jury of six. This is a longshoreman's personal injury action. Plaintiff-appellee brought suit in the court below to recover damages on his claim of negligence and

unseaworthiness for an injury to his right shoulder which he alleges he sustained October 28, 1969 aboard the shipowner's m/s Svensksund, (hereinafter the "vessel") at Pier 21, Brooklyn, New York, while technically in the employ of third party defendant-appellee, International Terminal Operating Co., Inc. (hereinafter the "stevedore").

After trial on October 16, 17, 19, 23 and 24, 1973 the jury returned a special verdict in plaintiff's favor for $10,000, only on his claim for negligence. Additionally, plaintiff was found free of any contributory negligence and the stevedore was exonerated by the jury's finding that it had not breached its warranty of workmanlike service [14].* The shipowner then made timely motion for judgment n.o.v. and for a new trial on all the issues of the case which was denied by decision and order of Judge Ward dated December 10, 1973 [44-49], the court below essentially holding that on the testimony presented, the dispute as to the manner and circumstances of plaintiff's "accident" were matters for the jury's determination, and that there was no

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*All references are to pages in the Joint Appendix.

basis for a new trial on the claim of the shipowner of a fatally inconsistant verdict, contrary to the weight of evidence and/or the result of mistake, passion, prejudice or error or omission in the charge, or in admission of evidence.

The happening of plaintiff's "accident" was sharply controverted at trial. Plaintiff's testimony of its occurrence was uncorroborated, and was refuted by the former Chief Officer of the vessel, Rune Stahl, who witnessed the event and who testified that the "accident" was mere "play-acting" [345]. Plaintiff testified that he was caused to slip by the presence of grease spots on the vessel's weather deck near the #4 hatch. He then tripped over pallets laid out on deck between the inshore coaming of the #4 hatch and the rail and as an alleged combined result struck and injured the top of his right shoulder against the coaming which at the time of his accident was on his left hand side. Plaintiff, during cross-examination in attempting to explain the occurrence said, "I don't know how it happened, but I hit the coaming with my right shoulder." [201]

Issues Presented

I. Did the court below improperly deny the shipowner's motion at the close of plaintiff's case for

dismissal on the basis of plaintiff's failure to offer any credible evidence that he had an accident aboard the vessel; did the court below improperly deny the shipowner's motion for judgment n.o.v. on the ground that plaintiff's incredible explanation of the dynamics of his accident was physically impossible?

II. Did the court below abuse its discretion in refusing to grant a new trial on the following bases:

> A. That the jury's verdict was contrary to the weight of the credible evidence presented on the issue of the happening of the "accident", its "cause", plaintiff's freedom from contributory negligence, and the stevedore's performance in a workmanlike manner;
>
> B. that the verdict was fatally inconsistant in that it found liability for negligence and not for unseaworthiness notwithstanding the jury's apparant acceptance of plaintiff's claim of an untoward condition(s) on the vessel's deck;
>
> C. that the verdict was the product of mistake, passion, prejudice or the result of error or omission in the charge or in admission of evidence. In this connection the shipowner contends that the court improperly charged the Safety & Health Regulations for Longshoring while refusing to charge the stevedore's duty to inspect and thereafter discontinue work in unsafe conditions, and in erroneously allowing in evidence the report of Henry J. Magliato, M.D. (Plaintiff's Exhibit 1), who plaintiff's medical expert, David Graubard, was permitted to identify as the "impartial" consultant of the United States Department of Labor [180].

The Facts

Plaintiff was the sole fact witness on his own behalf, although three other men, the Chief Mate and two longshoremen, according to plaintiff's testimony, were on deck at the #4 hatch [204]. He testified that he boarded the vessel, which was then moored starboard side to Pier 21 [421] at approximately 8:45 a.m. [104], having shaped up at the hiring hall that morning [79]. He boarded by means of the gangway and made a left turn [80, 84] upon reaching the weather deck, walking aft toward the hatch. He had been assigned to work in the vessel's #4 hold [80] and nearing the hatch went first [84] to look over the hatch coaming for the so-called coaming ladder leading into the hold, which he expected would be affixed to the inside of the coaming. However, although he looked "into" the hatch [85] he could not see over the coaming which was too high; "roughly" three feet high; up to his chest [81], although plaintiff was himself five feet ten inches tall [233]. He then walked athwartship from the forward, inshore (starboard) corner of the coaming past the forward, offshore corner [86] where he spoke to a longshoreman rigging the boom. This longshoreman indicated by gesture that the ladder to the hold was near the inshore, aft corner of the hatch [87-88], and plaintiff then walked aft [87] but did <u>not</u>

continue looking for the coaming ladder [212] which, accepting his testimony, would have been more easily visible from the offshore, if it were affixed to the inshore coaming. At the aft, offshore corner, plaintiff made an immediate left hand turn [90, 118] and walked back to the inshore side within a distance of one foot from the aft coaming of the hatch [69, 117], which was at his left hand [90, 118]. Upon reaching the aft, inshore corner plaintiff again turned left and proceeded to walk forward, the inshore side of the coaming to his left, until he reached a point perhaps two feet forward of this corner [118], Point "Y" in the blackboard diagram drawn by plaintiff and his attorney, for the very purpose of explaining the path taken by plaintiff. [769] At this point he heard a "crackle" which he apparantly attributed to the tensing of the guy restraining the boom being rigged on the offshore side. He also noticed a second longshoreman at a point designated by a circle on the blackboard diagram, in the middle of the hatch on the inshore side, whom he intended to ask about the ladder [88]. Plaintiff paused and after assuring himself that the boom was in no danger of falling proceeded to walk forward, as always, with the coaming to his left. He noticed the grease as he started walking forward from Point "Y" [122], after taking a "couple" of steps through

the grease spots, perhaps, although he was not sure [123]. He, however, saw the spots "too late" [92].

The following occurred:

> "I looked over there and I saw that everything was all right then I continued walking. As soon as I walked a little more I saw some grease and when I saw it, it was too late. I was dodging and I tripped and I slipped over here on the pallet and spinned around and hit my right shoulder on the corner (sic)." [92]

> Also: "I continued walking. Then when I looked down it was too late, there was some grease there and I slipped and when I hit the pallet I spinned on the pallet." [91]

> Again: "I started to walk, I heard a crackle. I looked up and I started walking again and as I looked down, I saw a bunch of grease there and I tried to dodge them and I slipped and I fell on the pallets over there and I twisted around. I slipped and hit my right shoulder against the coaming." [121]

That is, plaintiff testified that he slipped on grease spots which he first saw a couple of feet from the aft inshore corner. He could not, however, testify how many steps he had taken "dodging" the spots on "tippy-toe" [123] before he reached the pallets which were laid out on deck at the approximate mid-point of the length of the hatch [132], perhaps twenty feet from the aft corner [133].

Plaintiff, who claimed he slipped first, may or may not have tripped over the pallets. He did not

[126]. He did [127, 200]. He did not remember whether his feet struck the pallets [265], or what other part of his body might have struck the pallets when he fell. It "could have been" his whole right side [262-264], although he fell forward [130] or fell on his back [126]. Chief Officer Stahl was ten to fifteen feet away at the time plaintiff fell [219] and was, or was not, looking at him [80, 253]. The Mate came right over to him, at which time plaintiff was lying on the pallets, face down [220]. At his deposition plaintiff volunteered that the "mate" who was watching him would say that "I did not fall." [129-253].

Plaintiff testified that he injured the top of his right shoulder [93, 201, 202, 203] when it struck the "side of the coaming" [102, 202-203] to his left, which had a 4" overhang or shelf at its top, according to Mr. Stahl [483]. No other part of plaintiff's body was hurt. Thus, the jury believed that plaintiff, while making a virtually complete journey around the hatch with the coaming always to his left, looking [213] or not looking [212] for a hatch ladder affixed to the coaming which he could not see, was not looking for or was not looking for intelligently, slipped after walking a few feet less than 20' on the inshore side of the hatch through grease spots, simply fell forward [130],

according to his deposition testimony, "and twisted" [130], according to his trial testimony, either tripped or did not trip over the pallet on deck, struck, possibly, his whole right side on the pallets as he fell, ended up lying face down on the pallet within ;0'-15' of an eye-witness who he knew would contradict his testimony, yet injured the top of his shoulder in the area of his right collarbone when it struck the coaming, did not strike his head and injured no other part of his body [126].

In summation, the attorney for plaintiff, after admitting that he was "puzzled" by plaintiff's description of the mechanics of his accident, but that the chest-high or 3' high overhang of the coaming was what he, the attorney, said he then realized, after 5 days of trial 4 years after the "accident", was what plaintiff had struck [668]. In opposition to the motion for judgment n.o.v. the attorney offered the analogy or "stop action and instant replay football movies" [27] as an explanation of plaintiff's accident which is plainly physically impossible.

If the physical impossibility of plaintiff's injury is not enough in weighing the evidence, plaintiff contradicted his deposition testimony when he testified at trial to the presence of a second longshoreman on

deck [209], the gangwayman at the point designated by a circle, who failed to appear at trial. Plaintiff additionally admitted that he had not told anyone about grease on the deck when approached immediately after the "accident" [236] or when he reported his "accident" to the stevedore timekeeper [237]. He did not mention the crackling of the boom to anyone aboard ship. But the impeaching effect of these contradictions and inconsistancies pales by comparison with that offered by the evidence of the ship's construction.

Located in the passage between the forward coaming of the #4 and the after bulkhead of the mid-shiphouse is the so-called "escape" or trunk hatch ladder, leading to the hold which according to plaintiff looks like a bathroom hamper, with a lid which flips back [214]. Defendant's Exhibit D-1, a photograph of the deck area forward of the hatch, taken from a port to starboard perspective [309], shows this ladder, in an area which plaintiff testified no ladder, equipment or machinery was present [114]. This escape hatch ladder was directly in the path of plaintiff as he allegedly began his walk around the hatch from the forward inshore corner, offshore to ask the longshoreman rigging the boom where the ladder leading to the hold was located. Plaintiff, a longshoreman, almost invariably employed

as a holdman, of 25 years experience [287, 78], who accurately described the appearance of an escape hatch ladder prior to the introduction in evidence of D-1, passed within inches of the ladder while walking offshore. Was his testimony that he was looking for the ladder credible? Defendant's Exhibit D-1 also shows that plaintiff's testimony that the coaming was "chest high" was also false, as Mr. Stahl testified [322]. Exhibit D-1 shows the starboard rail of the vessel at the #4 hatch to be barely waist high to a man standing in the background of the photograph, as well as the overhang on the top of the coaming forward of the hatch, and the inside of the starboard coaming where plaintiff, according to his testimony, expected the hold ladder might be affixed. Obviously, Exhibit D-1 was taken from eye level by a man standing on deck at a point passed by plaintiff in his fruitless odyssey in search of the ladder. It shows, from the point of vantage where this photograph was taken, that plaintiff could see whether or not there was a ladder affixed to the starboard coaming which appears in the photograph; could verify its non-existence before and without asking the longshoreman rigging the boom. This photograph was obviously taken at a point very close to where the offshore longshoreman was located.

Defendant's Exhibit D-5, a photograph which from its perspective was also inarguably taken from eye level by someone standing on deck, shows the aft coaming, taken looking athwartship. It proves that the inside of this section of the coaming was also clearly visible to this 5' 10" plaintiff from the offshore (port) side of the deck. Defendant's Exhibit D-6, a photograph taken from the poop deck aft of the hatch shows a longshoreman leaning over the coaming at the port forward corner, confirming what is obvious from Defendant's Exhibits D-1 through 7, that plaintiff's testimony that he could not confirm the non-existence of the coaming ladder by looking at the four interior sides from the forward inshore corner was false. If plaintiff was not looking for the ladder what was he looking for? An unsafe passage? [see 327]

Captain Stahl testified that the #4 hatch was the sternmost hatch on the ship (Exhibit C). He also testified that when the hatch was being worked, the MacGregor hatch covers were rolled back and stowed in the space behind the aft coaming and between it and the bulkhead of the poop deck, which is shown by Defendant's Exhibit D-5. When the covers were in place there was still no access from port to starboard aft of the hatch, which was walled off as shown in Defendant's

Exhibit D-4. At sea this space was used by the crew as a swiming pool [462]. Clearly, as Mr. Stahl testified, plaintiff had to walk completely around the vessel's stern in order to again reach the inshore side [321, 464, Exhibit C]. But plaintiff, according to his testimony, walked directly behind the hatch within a foot of the coaming before making the turn at the aft inshore corner, in order to begin walking forward on the inshore side. This too was impossible. This is no innocent error or failure of recollection on the part of plaintiff. How could he explain his purpose in walking around the hatch except by claiming that he was looking for a coaming ladder? How could he explain his need to find a coaming ladder witnout claiming that there was no escape hatch ladder, which was located forward of the hatch? How could he explain his need to ask the offshore longshoreman about the ladder's whereabouts unless by claiming the hatch was too high? How could he explain walking around the very stern of the vessel while looking for a ladder on an inside of the "too high" coaming? How could he account for his own carelessness in slipping on grease which he saw before his "accident" except by saying that he had been startled by the "crackling" of the guy? How could he explain tripping over 4' x 4' [348] pallets on deck except by saying that he first slipped then tripped? But plaintiff, despite

what was obviously great effort could not and did not explain how it is possible to sustain the injury claimed by striking the coaming to his left as a result of a slip, trip, either or both which occurred while he was walking not running, which caused him to fall forward, possibly strike his whole right side against the pallets, ending up face down, injuring nothing save the top of his right shoulder. If plaintiff did not know how this happened, how could the jury?

Did not this plaintiff perpetrate a fraud on the court below?

POINT I

THE COURT BELOW ERRED IN DENYING THE SHIPOWNER'S MOTION AT THE CLOSE OF PLAINTIFF'S CASE AND IMPROPERLY DENIED THE MOTION FOR JUDGMENT N.O.V. ON THE GROUND THAT PLAINTIFF'S TESTIMONY WAS INCREDIBLE AND HIS ACCIDENT PHYSICALLY IMPOSSIBLE.

The propriety of a grant of judgment n.o.v. or motion for a directed verdict is subject to the same test laid down in this Circuit most recently in Armstrong v. Commerce Tankers Corp., 423 F. 2d 957 at 959. It is as follows:

> ". . . Whether the motion is one to direct a verdict or to set aside a verdict which the jury has returned, the test applied by the court is the same. The evidence must be viewed in the light most

> favorable to the party other than the movant. The motion will be granted only if (1) there is a complete absence of probative evidence to support a verdict for the non-movant or (2) the evidence is so strongly in favor of the movant that reasonable and fair minded men in exercise of impartial judgment could not arrive at a verdict against him." (emphasis supplied)

Plaintiff's purpose in walking around the hatch is unsupported by probative testimony because his testimony (1) that he could not see over the coaming is demonstratably false; (2) the readily described escape hatch ladder was present forward of the hatch, contrary to his testimony, and he passed this ladder at the beginning of his journey; (3) he would not have walked completely around the vessel's stern looking for a ladder, and so claimed to have walked just aft of the hatch opening, which was not practically possible. Plaintiff's testimony that he slipped, perhaps tripped, spun, struck the top of his shoulder against the coaming to his left, on what his attorney claims, but which plaintiff himself never claimed, was a 4" or 5" "flange" at the coaming's top, which was chest high when he fell forward as the "accident" began, could only be accomplished if plaintiff fell up, which is incredible.

The shipowner acknowledges that the burden of pursuasion required is indeed substantial. There can be no question that it is not the function here, as a

general matter, in reviewing a denial of a motion for judgment n.o.v., to weigh the evidence presented in the court below. However, the rule acknowledges that testimony supporting plaintiff's verdict must be "probative" and it would follow that incredible testimony is not probative. The court below in denying the motion concluded that "[i]n this case, the plaintiff's testimony, the jury chose to believe, provides the probative evidence required to support the jury verdict", but did not find in what way or aspect it was probative. Plaintiff's entitlement to a judgment against the shipowner depends entirely on whether or not his testimony was probative. The shipowner, for the many reasons set out below, believes that no probative testimony was given by plaintiff in view of the inconsistancies, contradictions and descriptions of flat physical impossibilities with which the record is replete. The question here is essentially how much unrebutted contradiction by physical facts is needed, before the court must conclude, as a matter of law, that plaintiff's verdict (supported only by his highly interested contradictory and evasive testimony, further contradicted without impeachment by an eye-witness who denied the occurrence of an accident), if allowed to stand, would make the judicial process a vehicle of injustice.

The rule enjoining an Appeals Court from weighing the testimony given at trial does not apply to incredible evidence. Thus, if the physical facts positively contradict the testimony of the witness, his oral testimony is to be disregarded. Whittington v. Mayberry, (10 Cir., 1951) 190 F. 2d 703 at 705. F. W. Woolworth Co. v. Davis (10 Cir., 1930) 41 F. 2d 342, 347; Blackley v. Powell (4 Cir., 1934) 68 F. 2d 457; Chicago M. St. P. & R.R. Co. v. Lineham, (8 Cir., 1933) 66 F. 2d 373; Story v. U.S., (10 Cir., 1932) 60 F. 2d 484; Anderson v. Hudspeth Pine Inc., (10 Cir., 1962) 299 F. 2d 874.

When a physical impossibility is demonstrated entry of judgment n.o.v. is mandatory. Fitgerald v. Pennsylvania R.R. Co., (2 Cir., 1947) 164 F. 2d 323; Redman v. Baltimore and Carolina Lines, (2 Cir., 1934) 70 F. 2d 635; modified on other grounds 295 U.S. 654; Union Indemnity Co. v. Linesdorf, (2 Cir., 1930) 37 F. 2d 26, cert. denied 281 U.S. 730; Croker v. Central Vermont Railway Co., (2 Cir., 1949) 172 F. 2d 324.

The rule applicable here is succinctly stated by this court in O'Connor v. Pennsylvania Railroad Co., 308 F. 2d 911, where this court affirmed a District Court ground of judgment n.o.v. in a case where plaintiff claimed a negligent failure to remove snow and ice,

which allegedly had been permitted to remain an unreasonable period of time. The defendant offered proof that the snow present at the site of plaintiff's accident was newly fallen. Reference to weather records satisfied the Court of Appeals, as it had the trial court, that although it was possible that old snow and ice was present, the evidence was overwhelmingly in defendant's favor, although only inferentially. At 308 F. 2d 914 the Court held as follows:

> "'The propriety of granting or denying a motion for a directed verdict [or for judgment non obstante veredicto] is tested both in the trial court and on appeal by the same rule. The trial court must view the evidence and all inferences most favorably to the party against whom the motion is made. The reviewing court must do the same with respect to a judgment entered on a directed verdict or the denial of a motion for a directed verdict or a judgment entered notwithstanding the verdict.' 2B Barron & Holtzoff, Federal Practice and Procedure, § 1075 at 378 (1961). In granting such a motion for a judgment notwithstanding the verdict, and in affirming it on appeal, the function of the jury is not usurped. The jury is simply not being permitted to make unreasonable findings of fact. The case is withdrawn from them 'as a matter of law' because no jury could reasonably bring in a verdict for the opponent of the moving party. To decide upon the propriety of granting this motion, the court looks to the substantial evidence tending to bolster the case of the nonmoving party and draws all reasonable inferences therefrom. But the evidence cannot properly be deemed substantial nor the inferences reasonable if they are contrary to proven physical facts. The inferences which may be drawn must be within the range of reasonable probability, Ford

Motor Co. v. McDavid, 259 F. 2d 261 (4th Cir.), cert. denied, 358 U.S. 908, 79 S. Ct. 234, 3 L. Ed. 2d 229 (1958) and must not be at war with undisputed facts."

What inference can be drawn, within the range of reasonable probability, from plaintiff's description of his accident which would support his contention that he struck the top of his right shoulder against the side of the coaming to his left while walking and falling forward. In Croker, supra, this court refused to grant judgment n.o.v. after resolving the issue raised by the defendant of the impossibility of plaintiff's injury occurring in the manner he described. Croker, perforce, is a decision based on the peculiar facts of the accident claim presented to that court. Obviously, from the facts of the Croker case no physical impossibility was demonstrated but the mechanics of the accident considered were necessarily different from those presented here. Moreover, the court in Croker was apparantly not faced with a record of contradictory descriptions of the manner of the happening of the accident, from the mouth of plaintiff himself. Here there are three reasons for concluding that plaintiff's testimony did not amount to probative evidence: (1) The physical impossibility described in the main theme of his testimony; (2) the contradictions and variations within his testimony as a whole and

(3) the total destruction of his credibility offered by the proof of the ship's construction.

POINT II

THE SHIPOWNER IS ENTITLED TO A NEW TRIAL ON ALL THE ISSUES PRESENTED

The basis of a motion for a new trial differs from that pursuant to Rule 50(b) FRCP for judgment notwithstanding the verdict. A new trial motion invokes the sound discretion of the trial court and may be based upon, but is by no means limited to, a showing that the verdict is against the weight of the evidence. In Montgomery Ward & Co. v. Duncan, (1940) 311 U.S. 243 the Supreme Court at p. 251, discussing the difference between the two motions, stated the rule as follows:

> "Each motion, as the rule recognizes, has its own office. The motion for judgment cannot be granted unless, as a matter of law, the opponent of the movant failed to make a case and, therefore, a verdict in movant's favor should have been directed. The motion for a new trial may invoke the discretion of the court in so far as it is bottomed on the claim that the verdict is against the weight of evidence, that the damages are excessive, or that, for other reasons, the trial was not fair to the moving party; and may raise questions of law arising out of alleged substantial errors in admission or rejection of evidence or instructions to the jury."

The trial court, in considering a motion for a new trial, has the very weighty obligation stated in Aetna Casualty & Surety Co. v. Yeatts (4 Cir., 1941) 122 F. 2d 350 where the Court held at pp. 352-353:

> "On such a motion (for a new trial) it is the duty of the judge to set aside the verdict and grant a new trial, if he is of the opinion that the verdict is against the clear weight of the evidence, or is based upon evidence which is false, or will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict."

See also Binder v. Commercial Travelers Mut. Acc. Ass'n. (2 Cir., 1940), 165 F. 2d 896, 902.

The grant of a new trial does not conflict with the Seventh Amendment which provides that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law", for the right to a new trial existed on common law prior to the enactment of the Seventh Amendment. In Bright v. Eynon, (KB 1757) 1 Burr. 390, 393, 97 Eng. Rep. 365 Lord Mansfield stated:

> "If an erroneous judgment be given in point of law, there are many ways to review and set it right. Where a court judges a fact upon depositions in writing there sentance or decree may, many ways, be reviewed and set right. But a general verdict can only be set right by a new trial; which is no more than having the cause more deliberately considered by another jury; when there is a reasonable doubt, or perhaps a certainty, that justice has not

> been done . . .. If unjust verdicts obtained under these and a thousand like circumstances were to be conclusive forever, the determination of civil property, in this method of trial, would be very precarious and unsatisfactory. It is absolutely necessary to justice, that there should, upon many occasions, be opportunities of reconsidering the cause by a new trial."

Great latitude is given to the District Courts to grant a new trial where in the discretion of the Court a new trial is needed to prevent an injustice. Delta Engineering Corp. v. Scott, (5 Cir., 1963) 322 F. 2d 11 reh. den. 325 F. 2d 432, cert. den. 377 U.S. 905. The requirement that the interest of justice be served is a basis for a grant of a new trial and where the jury disregards the "complete factual picture presented" in reaching its verdict, "doing of justice" mandates a new trial, Reyes v. Grace Line, Inc. (S.D.N.Y., 1971) 334 F. Supp. 1104.

Moore's Federal Practice Vol. 6A 2nd Edition 1974 states the facts to be considered on application of a new trial at § 59.08 [3] p. 59-121:

> ". . . Factors to be considered are: the extent to which the court is reasonably well satisfied that the testimony given by the witness is false or absent falsity, that he was mistaken; whether the testimony relates to a material issue; whether it is merely cumulative; the likelihood that it was a real factor in the outcome of the trial; the extent to which the party seeking the new trial was taken by surprise by the false testimony; whether he was unable to

> meet it then or although diligent, did not know of its falsity until after the trial; and movant's diligence in unearthing the falsity. When these various factors are considered in the entire settling of the trial, including the outcome, the court should grant or deny a new trial, whichever would best promote substantial justice in the particular case."

A refusal to grant a new trial in a proper case is an abuse of discretion by the trial court, Campbell v. Clark (10 Cir., 1959) 271 F. 2d 578; Georgia-Pacific Corp. v. United States (5 Cir., 1959) 264 F. 2d 161; Firemen's Fund Insurance Co. v. Aalco Wrecking Co. (8 Cir., 1972) 466 F. 2d 179, cert. denied 410 U.S. 930, since a motion for a new trial is addressed to the Court's discretion, Mattox v. United States (1892) 146 U.S. 140.

The jury verdict absolving plaintiff of any contributory negligence is also contrary to the weight of evidence. For this reason and because contributory negligence by plaintiff is a breach of the stevedore's warranty of workmanlike service, McLaughlin v. Trelleborgs Angfartygs A/B (2 Cir., 1969) 408 F. 2d 1334, a grant of a new trial in plaintiff's case against the shipowner would require a new trial of the third party case as well.

The inconsistancy of the jury's verdict in finding liability for negligence but finding the vessel

to be seaworthy, when plaintiff's claim related only to unsafe conditions is a basis for a new trial.

The standard of seaworthiness in this case is the reasonable fitness (safeness of the vessel's deck on the inshore side of the No. 4 hatch), Mitchell v. Trawler Racer, Inc. (1960) 362 U.S. 539. Since the jury found the deck reasonably fit the ship's officers, specifically Chief Officer Mr. Stahl, cannot be held to have been negligent in creating or suffering a continuance of an unsafe condition. Plaintiff, according to the jury's verdict exonerating the shipowner for liability for unseaworthiness found that plaintiff was given a deck reasonably safe to work on and the record discloses no other basis for the jury's finding of negligence. The jury's verdict is, therefore, irreconcilable.*

In case of an inconsistant verdict the court is obliged to attempt to reconcile the differences in the answers given in the special verdict, if possible, Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines Ltd.

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*It is hard to imagine . . . how an owner can be negligent if the vessel was not unseaworthy." Spano v. N.V. Konink Lijke Rotterdamsche Lloyd, 472 F. 2d 33, 35 n. 1 (2 Cir., 1973).

(1962) 369 U.S. 355; Gallick v. Baltimore & Ohio R.R. Co. (1963) 372 U.S. 108. Moreover, the challenged verdict must be based upon the evidence given and the applicable law. Malm v. United States Lines Company, (S.D.N.Y., 1967) 269 F. Supp. 731. The court in Malm was able to reconcile a similarly inconsistant verdict on the basis of his assumption that the jury, on the facts presented, believed that a hatch into which plaintiff fell was left open for good purpose, and that fact alone did not, therefore, render the vessel unseaworthy. The Court further reasoned that the finding of negligence might have been bottomed on the jury's belief that the Chief Mate breached his duty to plaintiff of warning him that the hatch was open. But there can be no question here of any failure to warn plaintiff, because he saw the grease spots and the pallet walkway prior to his fall. He was "dodging" the spots on tip-toe prior to the time when he slipped. The verdict cannot, moreover, be reconciled on the basis of a different standard of proximate causation which would be possible had this been the Jones Act case. See Aylala v. Moore-McCormack Lines, Inc. (S.D.N.Y., 1972) 55 FRD 263.

In Royal Netherlands Steamship Co. v. Strachan (5 Cir., 1966) 362 F. 2d 691, a new trial was ordered after a jury returned a special verdict finding that a

winch was not unseaworthy, but that its operator continued using it after he knew that it was defective. This and other inconsistancies the court held to be irreconcilable.

In this case the jury was charged that they might consider the Safety & Health Regulations for Longshoring in determining the shipowner's negligence and unseaworthiness. Plaintiff's attorney urged that grease spots on deck and the presence of the pallet walkway rendered the vessel unseaworthy and the shipowner negligent. Thus, plaintiff's claim of liability was based on a claim of unsafe conditions on the deck. But the jury found expressly that no unseaworthy condition existed which, on the facts of this case, could only result logically in a finding that there was also no negligence. In this case liability for negligence can only be predicated upon the shipowner's creation or continuation of unsafe conditions which the jury held were not present.

The Court erroneously charged that the Safety & Health Regulations for Longshoring applied in plaintiff's case against the shipowner. This, too, is a basis for reversal of the denial of the motion for a new trial.

The Court charged in essence that the Regulations were binding upon the stevedore and could be

considered in evaluating whether the shipowner was negligent and its vessel unseaworthy. The Court below relied on Provenza v. American Export Lines, Inc. (4 Cir., 1963) 324 F. 2d 660 which appears to hold that the Regulations are binding on the shipowner. However, in this court Albanese v. N.V. Nederl. Amerik. Stoomv. Maats. (2 Cir., 1965) 346 F. 2d 481 is controlling and the law in this Circuit is that the Regulations "are not relevant to the issues involved in the claim against the shipowner", 346 F. 2d at 484. Moreover, Provenza, supra, may no longer be the law even in the Fourth Circuit. In Frasca v. S/S Safina E. Ismail, (4 Cir., 1969) 413 F. 2d 259, the Fourth Circuit indicated that the Provenza holding was not what it had first appeared. The Court stated:

> "While these Regulations, by their terms, do not govern the conduct of the shipowner, we have previously held that their breach by the stevedore can impose liability on the ship for injury to a longshoreman. (citing Provenza) . . ., and this in turn leads to indemnity from the stevedore."

The Fourth Circuit then does not interpret Provenza as holding that the Regulations governed the conduct of a shipowner, but that a breach of the Regulations by the employing stevedore compels a verdict of indemnity in shipowner's favor against a stevedore. At trial below the jury was charged that they could consider

as an independent and much higher standard of the shipowner's negligence and unseaworthiness, the housekeeping sections of the Regulations, with their mandatory conditions. The Court refused to charge that their breach by the stevedore compelled a verdict of indemnity for shipowner [10,721].

Clearly Frasca holds that if the Regulations are breached by the stevedore the shipowner must have indemnity. The jury verdict necessarily implies a breach since to find liability they must have found a tripping hazard present, or that a slippery condition had not been eliminated as it occurred. Frasca also seems to say, consistant with 1504.2 of the Regulations themselves, with Judge Bryan's dissent in Provenza, and with Albanese, that the Regulations are relevant only in the shipowner's case against the stevedore. In view of the verdict and the holding in Frasca, if the verdict against the shipowner is not disturbed, the shipowner is entitled to judgment n.o.v. against the stevedore. Frasca is precisely on point in that plaintiff in that case claimed to have tripped over a bar which the stevedore-employer did not see prior to the accident. The stevedore was held liable for indemnity for failing to discover this hazard since they had an opportunity to see it, it was not a latent defect, and because the shipowner was held

liable. The fact that in Frasca the shipowner might have had a longer time to discover the defect was held to be irrelevant. Here, as in Frasca, longshoremen were working in the area prior to the "accident."

Moreover, the Court in the case at bar refused to charge the stevedore duty to inspect [722-723] which in our view compounded the failure to give the requested charge that a breach of the Regulations meant that the shipowner was entitled to indemnity without more.

The shipowner is entitled to a new trial on the basis of the court's error in admitting in evidence the report of Dr. Magliato after Dr. Graubard, plaintiff's expert, had been permitted to identify Dr. Magliato as the impartial examiner for the United States Department of Labor.

The admission of the report of Dr. Magliato with his identification as an impartial official of the U. S. Government so prejudiced the jury's thinking, that a new trial on all the issues should be granted, not only the issues of damages. Dr. Magliato's report indicates that he, in early November 1969, made physical findings contradicting those of Dr. Tagliagambe, who plaintiff's attorney characterized as the "company doctor." The jury called for and was given Dr. Magliato's report. The jury itself characterized it as "the Department of

Labor doctor's report." [740] Obviously, the jury placed great weight upon the doctor's report and in all probability totally disregarded the oral testimony heard in court. In view of the amount of the jury's verdict, it is certain that the jury did not accept Dr. Tagliagambe's testimony that plaintiff was "actively" restricting the motion of his right arm during the doctor's examination [402], and that the injury sustained was a "minor", "minimal injury" [409].

The sole purpose of the introduction of Dr. Magliato's report was to impeach the credibility of Dr. Tagliagambe. It would appear that the trial court believed that since Dr. Tagliagambe had seen Dr. Magliato's report after his recommendation that plaintiff return to work, this report was a record relied on by the doctor in the course of his treatment. However, Dr. Tagliagambe testified that the report was merely part of his file, that he had read it when plaintiff physically brought it to him and that he had followed instructions contained therein to take further x-rays of plaintiff's right shoulder and resume treatment. Dr. Tagliagambe complied with Dr. Magliato's recommendations although he did not think treatment necessary except for plaintiff's subjective symptoms [374]. This was the sole use of the report that Dr. Tagliagambe

testified to. Dr. Magliato's findings contradicted those of Dr. Tagliagambe in that Dr. Magliato allegedly found swelling of the right shoulder at a time when Dr. Tagliagambe found none [395].

The shipowner contends that in this case, which turned on the question of credibility, the credibility of the shipowner's defense of plaintiff's damage claim carried over in the jury's mind to the liability case and resulted in the finding adverse to the shipowner. The admission of plaintiff's Exhibit 1 was not harmless error.

It appears from the record that the court below believed the report admissible only because it had been used by Dr. Tagliagambe during the course of his treatment of plaintiff [387]. It is suggested from the authority relied on in the court's opinion denying shipowner's post-trial motions, that the court may have finally concluded that the record was properly admitted merely as a business record under 28 U.S.C. 1732. Neither approach is sound. Dr. Magliato's report is dated November 21, 1969 and refers to his November 17, 1969 examination, conducted two weeks after Dr. Tagliagambe told plaintiff he was able to return to work. Dr. Graubard first examined plaintiff November 4, 1969, the day after [136], and after plaintiff retained an attorney [238].

Litigation of this case began with the examination by Dr. Graubard. The next step was the examination by Dr. Magliato brought on by the filing of the report of Dr. Graubard with the Department of Labor. The purpose, from plaintiff's viewpoint, of Dr. Magliato's examination was to prolong his period of claimed disability.

Dr. Magliato's report notes "swelling" over the right acromio-clavicular joint as well as restriction of motion, but the degree of swelling is not stated and the report is silent as to whether restriction was observed on "active" motion of the arm, i.e., upon plaintiff's complaint of pain without manipulation of the arm by the examiner. Plaintiff complained of pain upon raising his arm, as the report notes, which may indicate that all restrictions were active.

First, the "use" made by Dr. Tagliagambe of the report is clear from the record. This use will not support its admission since it cannot be viewed in the same light as a hospital record or doctor's report considered, for example, by a second treating doctor. Obviously there are occasions where an expert medical witness will be permitted to consider a prior report so that he may inform himself of plaintiff's earlier physical condition, upon which he may then be entitled to base

his opinion. In that case it would seem proper to admit the prior report. See McCormick on Evidence, 2d Ed. §15. But here Dr. Tagliagambe was the first to observe plaintiff's physical condition and in no way based his opinion testimony on the opinion of Dr. Magliato. "Use" or reliance on the report is of no moment here.

Secondly, cases interpreting 28 U.S.C. 1732 lend no support for a conclusion that the report is admissible as a business record. Palmer v. Hoffman, 318 U.S. 109 (1942); Pekelis v. Transcontinental & Western Air, Inc. (2 Cir., 1951) 187 F. 2d 122 cert. den. 341 U.S. 951; Korte v. New York, N. H. & H. R. Co. (2 Cir., 1951) 191 F. 2d 86. The report was obtained by plaintiff's attorney in anticipation of this lawsuit and indicates findings of an almost entirely subjective nature. Is this report, in effect, largely representations made by plaintiff to the doctor, a record "which experience has shown to be quite trustworthy", Palmer, supra, 318 U.S. at 112?

Unfortunately, the court's perfunctory opinion denying the post-trial motions deprives this court of the trial judge's impressions of the evidence presented. We mentioned that although Judge Ward concluded that plaintiff's testimony supplied the necessary probative evidence, he did not indicate in what respect he believed

the evidence credible, which is perhaps unfortunate in view of the manifest contradictions testified to by plaintiff. Moreover, the court seems to have proceeded under the mistaken impression that the test of whether a motion for judgment n.o.v. should be granted is the same as the standard applicable on a motion for a new trial (see 46 and 47 where the new trial motion is rejected "for the reasons set forth above"). Moreover, the court did not confront the question of the verdict's inconsistancy, did not try to reconcile the special verdict but, disturbingly, nonetheless used the verdict's anomalous aspect to characterize any possible error in the charge of the Regulations as harmless.

CONCLUSION

The record of this case amply demonstrates that this is the unusual case where it is appropriate and required that the Court of Appeals reverse a District Court's denial of a motion for judgment n.o.v. Upon reading the record of this trial plaintiff's sworn testimony is revealed as almost palpably false. Alternatively, a new trial on all the issues of the case is mandated for the reasons set out above.

Respectfully submitted,

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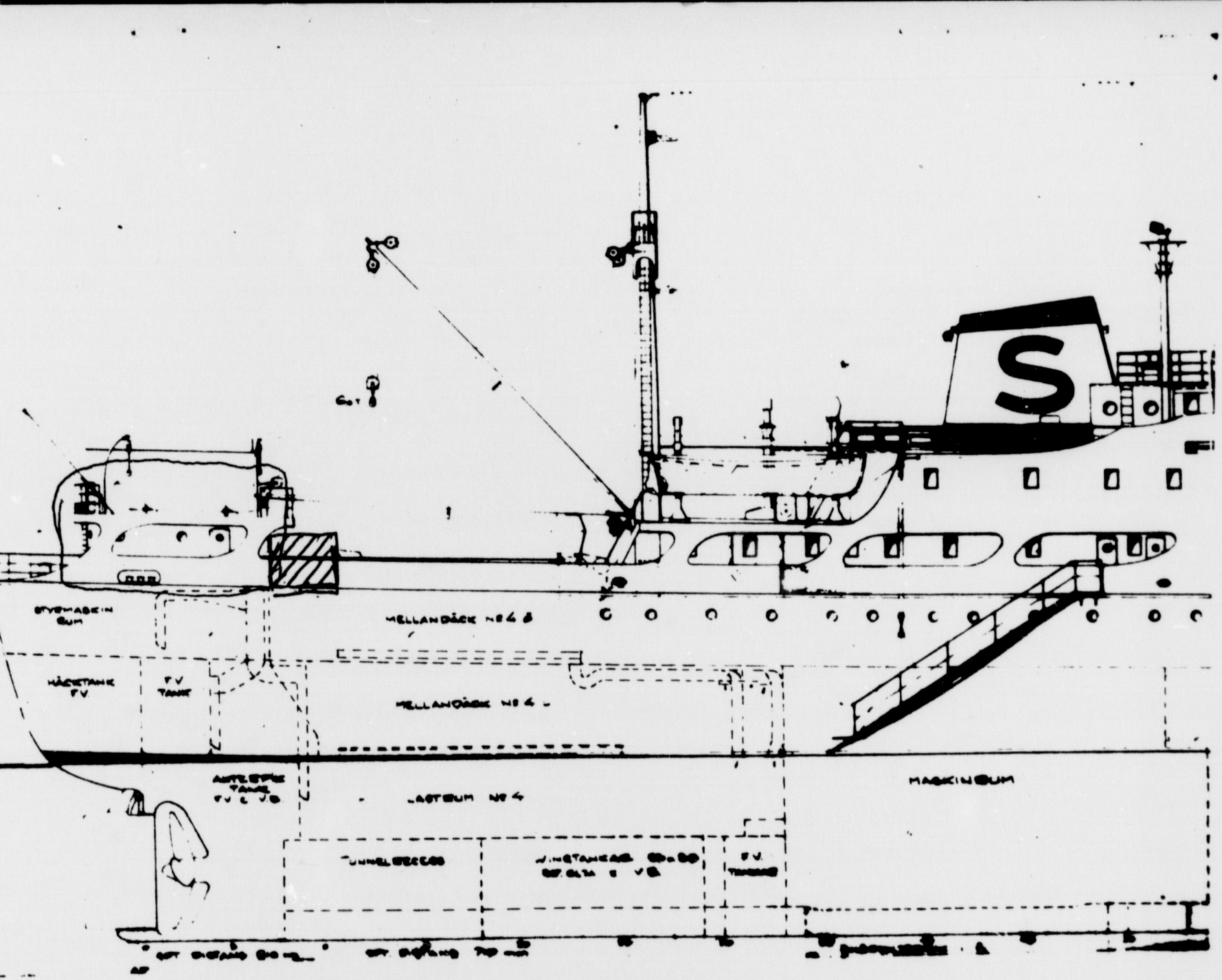
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U.S. COURT OF APPEALS:SECOND CIRCUIT

Index No.

BERNARDINI,

Appellee,

against

SATURNUS,

Appellant.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

I, James Steele, being duly sworn,

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at

250 West 146th Street, New York, New York

That on the 17th day of June 1974 at 160 Broadway, New York
801 2nd Avenue, New York

deponent served the annexed Appellant's Brief upon

Zimmerman & Zimmerman-Attorneys for Appellee Bernardini
Alexander, Ash, Schwartz & Cohen-Attorneys for Appellee Int'l. Terminal Operating Co.

the in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Attorney(s) herein,

James Steele

Print name beneath signature

Sworn to before me, this 17th day of June 1974

JAMES STEELE

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0418950
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975